In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 321

BETWEEN:-

(1) THE HUMAN RIGHTS COMMISSION
(2) K F
(3) O O (a minor) (by his next friend Tiffanne Thomas)
(4) R W

Plaintiffs

-and-

(1) THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS
(2) THE MINISTER OF SOCIAL DEVELOPMENT AND SPORTS
(3) THE DIRECTOR OF THE DEPARTMENT OF CHILD AND FAMILY SERVICES

Defendants

RULING

(In Chambers)

Whether conditions for grant of protective costs orders satisfied – form of protective costs order

Date of hearing: 16th February 2018
Date of ruling: 20th February 2018

Mr Saul Dismont, Marshall Diel & Myers, for the Plaintiffs
Ms Wendy K Greenidge, Attorney General's Chambers, for the Defendants

Introduction

1. This is a ruling on the Plaintiffs' application for a protective costs order. They seek one in relation to this action, in which they request declaratory relief as to the meaning and effect of section 35 of the Children Act 1998 ("the 1998 Act").

2. The Defendants oppose both the Plaintiffs' application for a protective costs order and the Plaintiffs' claim for declaratory relief. They have applied to strike out the Plaintiffs' claim. The strike out application has been adjourned until after the determination of the protective costs application.

Governing principles

3. The principles governing the making of a protective costs order were stated and discussed in the context of the English Civil Procedure Rules by Lord Phillips MR (as he then was), giving the judgment of the Court of Appeal of England and Wales in R (Corner House) v Trade and Industry Secretary [2005] 1 WLR 2600 at paras 72 – 80. They were applied in a Bermudian context by Kawaley CJ in Bermuda Environmental Sustainability Taskforce v Minister of Home Affairs (Protective Costs) [2014] Bda LR 68 SC at paras 5 – 9. The principles must be applied flexibly: see Morgan and Baker v Hinton Organics (Wessex) Ltd [2009] CP Rep 26 *per* Carnwath LJ (as he then was), giving the judgment of the Court of Appeal of England and Wales, at para 40 and the Bermuda Environmental Sustainability Taskforce case *per* Kawaley CJ at paras 8 – 9. The jurisdiction should be exercised

only in the most exceptional circumstances. See Corner House *per* Lord Phillips MR at para 72.

4. As stated by Lord Phillips MR in Corner House at para 74:

"*(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.*

(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

5. The Court must be satisfied that the applicant has a real (as opposed to fanciful) prospect of success, ie that its case is properly arguable. See Corner House *per* Lord Phillips MR at para 73. When assessing that prospect in the present case, the Court must bear in mind the test for granting a declaratory judgment. As stated by Lord Dunedin in Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438 HL at 448:

"*The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.*"

6. This formulation, although not adopted by the other members of the House in that case, has stood the test of time, being cited with approval in, for example, the legal textbook Wade and Forsyth on Administrative Law, 11th

edition, and the recent case of R (on the application of The Freedom and Justice Party) v Secretary of State [2016] EWHC 2010 (Admin).

Statutory scheme

7. Section 5 of the 1998 Act provides that the purposes of the Act are to protect children from harm, to promote the integrity of the family and to ensure the welfare of children. Section 6 of the 1998 Act provides that in the administration and interpretation of the Act the welfare of the child shall be the paramount consideration. These sections provide a legislative steer for the interpretation of section 35.

8. Section 35 of the 1998 Act provides:

"***Representation of child and of his interests in certain proceedings***

(1) For the purpose of any specified proceedings, the court shall appoint a litigation guardian for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.

(2) The litigation guardian shall be under a duty to safeguard the interests of the child.

(3) Where—

(a) the child concerned is not represented by counsel; and

(b) any of the conditions mentioned in subsection (4) is satisfied,

the court may appoint counsel to represent him.

(4) The conditions are that—

(a) no litigation guardian has been appointed for the child;

(b) the child has sufficient understanding to instruct counsel and wishes to do so;

(c) it appears to the court that it would be in the child's best interests for him to be represented by counsel.

(5) Counsel appointed under or by virtue of this section shall be appointed, and shall represent the child, in accordance with rules of court.

(6) In this section 'specified proceedings' means any proceedings—

(a) on an application for a care order or supervision order;

(b) in which the court has given a direction under section 30(1) and has made, or is considering whether to make, an interim care order;

(c) on an application for the discharge of a care order or the variation or discharge of a supervision order;

(d) on an application under section 33(4);

(e) in which the court is considering whether to make a custody order with respect to a child who is the subject of a care order;

(f) with respect to contact between a child who is the subject of a care order and any other person;

(ff) under Part IVA (custody jurisdiction and access);

(g) under Part V (protection of children);

(h) on an appeal against—

(i) the making of, or refusal to make, a care order, supervision order or any order under section 28;

(ii) the making of, or refusal to make, a custody order with respect to a child who is the subject of a care order;

(iii) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind mentioned in sub-paragraph (i) or (ii);

(iv) the refusal of an application under section 33(4); or

(v) the making of, or refusal to make, an order under Part V; or

(i) which are specified for the time being, for the purposes of this section, by rules of court.

(7) The Minister may establish panels of persons from whom litigation guardians appointed under this section must be selected."

Discussion

9. The Plaintiffs submit that in "*specified proceedings*", which are always public law proceedings, the Court should generally appoint: (i) a litigation guardian, who is usually a social worker, to safeguard the child's best interests; and (ii) counsel to represent the child. They say that this is what happens in England and Wales under section 41 of the Children Act 1989, upon which section 35 is modelled. However the Plaintiffs submit that in Bermuda this rarely happens, and that the legislative scheme – which was intended to protect the child's best interests – is thereby frustrated.

10. Sara Clifford, in an affidavit sworn on behalf of the First Plaintiff as Acting Executive Officer in support of the claim for declaratory relief, states that it was not until 2014 that a litigation guardian was appointed under section 35, and that since then a litigation guardian or lawyer has only been appointed in some 14 cases. She adds that this is in the context of some 20 to 40 cases to which section 35 would apply coming before the Family Court each week.

11. Ms Clifford states that the absence of the section 35 safeguards is of particular concern as the Family Court has extensive powers to remove children from their families and place them in the care of the Third Defendant. She further states this may then cause a child to be placed in foster care, police custody, a secure treatment facility or inside a prison.

12. Ms Clifford draws the Court's attention to what she describes as a "*disturbing practice*" in the Family Court whereby children are sent to secure facilities in the United States, where some have been forced to take medication and have been denied contact with family and friends. She states that none of the children visited with these very serious consequences had the benefit of a litigation guardian or counsel.

13. Section 36 of the 1998 Act provides that a litigation guardian has the right to examine and make copies of records held by the Third Defendant with respect to the child concerned. Ms Clifford suggests that this is a valuable safeguard.

14. Tiffanne Thomas, who acted as litigation guardian for the Second through Fourth Plaintiffs in the Family Court, has sworn an affidavit in support of the claim for declaratory relief expressing concern at what she sees as the Second and Third Defendants' lack of understanding of how section 35 is supposed to work and frustration at their refusal to fund litigation guardians or counsel appointed under section 35.

15. The Plaintiffs seek declarations that there are rebuttable statutory presumptions that in specified proceedings the Family Court has a duty to appoint both a litigation guardian and counsel to represent any given child. These declarations are unlikely to prove controversial. However the Plaintiffs seek further declarations *inter alia* that the Second and Third Defendants have statutory duties both to fund these appointments and to ensure that section 35 is enforced. It is the making of these declarations that are opposed.

16. Tanya Tucker, who is a Junior Crown Counsel, has sworn an affidavit for the Second and Third Defendants in support of the strike out application in which she makes various technical objections to the Plaintiffs' claim.

17. The Third Defendant has sworn an affidavit in opposition to the Plaintiffs' application for a protective costs order in which he complains that the Plaintiffs have failed to explain the issues about which it is concerned and why they are of general public importance. I find his position, with respect, to be somewhat obtuse.

18. In my judgment the Plaintiffs have raised an issue of general public importance, namely whether there has been a systematic failure by the Family Court and the Second and Third Defendants to apply section 35 properly, with the result that children going through the Family Court are

routinely deprived of the protection which the Legislature intended them to have. I am satisfied that the Plaintiffs' claim is properly arguable. The public interest requires that this issue should be resolved. It is real and not theoretical: on the Plaintiffs' case it has affected and continues to affect hundreds if not thousands of children.

19. I am satisfied that the First Plaintiff has a real interest to raise the issue. It is a statutory body appointed under the Human Rights Act 1981 ("the 1981 Act"). Its functions, as prescribed by section 14 of the 1981 Act, include encouraging an understanding of the fundamental rights and freedoms of the individual guaranteed by Chapter 1 of the Constitution and of the principle that all members of the community are of equal dignity, have equal rights and have an obligation to respect the dignity and rights of each other, and encouraging and co-ordinating activities which seek to forward these principles. The First Plaintiff submits that the present action is a disinterested attempt to forward these statutory objectives. Eg it submits that the alleged failure of the Family Court properly to apply section 35 breaches the right of the children affected to a fair hearing in the determination of the existence or extent of their civil rights or obligations which is guaranteed by section 6(8) of the Constitution.

20. The Second through Fourth Plaintiffs have all had bad experiences as children of going through the Family Court. The Third Plaintiff is a child, and the Second and Fourth Plaintiffs were children when the action was commenced but have since turned 18. They feel strongly about their experiences and wish to ensure that in future children going through the Family Court have the protection of a litigation guardian and counsel. That in itself is not necessarily sufficient to give them a real interest in the subject matter of this litigation. However, in light of the disposition of this application, I need not explore this issue further.

21. I am satisfied that the Defendants are proper contradictors. Section 8 of the 1998 Act provides that the Second Defendant has responsibility for the general supervision of the administration of the Act. Section 9 provides that

the Third Defendant shall *inter alia* arrange for the investigation of any allegation or report that a child may be in need of protection, care or supervision, and, where necessary, arrange for the delivery of child care services for the benefit of the child; and advise the Second Defendant on matters relating to child welfare. As the Second and Third Defendants are responsible for the administration of the 1998 Act, they are appropriate defendants to an application for a declaration as to its correct interpretation. This is particularly so as the Plaintiffs seek declarations as to the specific responsibilities of the Second and Third Defendants to enforce and fund the provisions of section 35. The First Defendant is joined as a formality, as is often done in public law proceedings, as her Chambers provides the counsel who defend the action.

22. The First Plaintiff has no private interest in the outcome of the case. Although the Second through Fourth Plaintiffs are motivated by their personal experience of proceedings under the 1988 Act, they stand to derive no tangible benefit from the proceedings, and in that sense, which is in my judgment the applicable one, they have no interest in the outcome.

23. As to the Plaintiffs' financial resources, Lisa Reed has sworn an affidavit as Executive Officer of the First Plaintiff, in which she states that the First Plaintiff does not have an in-house counsel and that its limited annual budget for legal fees is projected to be exhausted by the end of the fiscal year. She states that it has no money left to pay legal fees, and that without a protective costs order the First Plaintiff will have to withdraw from the action. The possibility that legal fees could be found in the budget for the next fiscal year, commencing April 2018, was not addressed. However I accept that, when deciding whether to continue with this action, the possibility of an adverse costs order would be a material factor for the First Plaintiff to consider in any fiscal year.

24. Ms Thomas has sworn a second affidavit in which she states that the Second through Fourth Plaintiffs do not have any money to pay for legal fees and expenses. The Fourth Plaintiff is legally aided. However she has stated that

she does not wish to proceed with the action if the First Plaintiff is not a party, "*as she does not want the pressure to fall on her and the other children*". Her counsel, Saul Dismont, is acting for the First through Third Plaintiffs *pro bono*.

25. The financial resources of the Defendants, ie two Ministries and, within one of them, a Government Department, are superior to those of the Plaintiffs. Mr Dismont estimated that his clients' costs of the action would be $40,000. Wendy Greenidge, who appeared for the Defendants, suggested that a more realistic figure would be $25,000. Mr Dismont's estimate struck me as the more carefully considered and realistic. However, both estimates point to the fact that the costs of bringing and defending the claim are likely to be relatively modest.

26. When deciding what is fair and just, on the facts of this case I should have regard to the nature of the Plaintiffs' claim. It is concerned with the proper construction of the section of a statute. Information of the sort provided by Ms Clifford provides background and context for this interpretative exercise. However the Court would be unlikely to be assisted by going into the details of particular cases in any depth. Indeed, an originating summons would not be an appropriate vehicle for an exercise of that kind, which might well involve contested factual allegations.

27. Given the nature of the claim, there is really no need for more than one active Plaintiff. The identity of the Plaintiff is not important, as this will not affect the nature of the interpretative exercise which the Court will be required to undertake. Indeed, for the purposes of the originating summons, the Plaintiff is really no more than a mechanism to bring the relevant legal arguments before the Court. That is not to minimise the experiences of the Second through Fourth Plaintiffs, but to explain that in this action the Court will not need to explore them.

28. The First Plaintiff, given its statutory functions, would be the obvious choice for lead Plaintiff. In my judgment it is fair and just to make a protective

costs order in its favour. The form of the order is that the First Plaintiff shall be protected from any adverse costs order. As the First Plaintiff is represented *pro bono* it would be unable to recover any costs if successful, so I need not make an order capping the amount of its recoverable costs.

29. In my judgment it is not fair and just to make a protective costs order in favour of the other Plaintiffs as their presence is not strictly necessary to bring the matter before the Court.

30. However, I can understand that the Second through Fourth Plaintiffs may want to continue as Plaintiffs to lend their support and moral authority to the action. If the Second and Third Plaintiffs play a purely formal role in the proceedings, then they will not be at risk as to costs. As the Fourth Plaintiff is legally aided then, provided that, through her counsel, she does not act unreasonably, and bearing in mind that she has brought the action in the public interest, the Court is most unlikely to make an order for costs against her even if she plays an active role in the proceedings. (If the Court did, then it would be on terms that the order was not to be enforced without leave of the Court.) It would be perfectly proper for her to do so.

31. I shall hear the parties as to costs.

DATED this 20th day of February, 2018

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Hellman J